Supreme Court, U.S.
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(3)

No. 95-440

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

RICHARD HOPEWELL,

Petitioner,

vs.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, MARY MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION DBA KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG and VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

DAVENPORT, EVANS, HURWITZ & SMITH
Timothy M. Gebhart*
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
(605)336-2880
Attorneys for Respondents Midcontinent, Hemmingsen and Armstrong
* Counsel of Record

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QUESTIONS PRESENTED

1. Does this case present issues appropriate for this Court's review under a writ of certiorari?

2. Are the decisions below proper?

LIST OF PARTIES

Respondent Midcontinent Broadcasting Corporation is a wholly owned subsidiary of Midcontinent Media, Inc. Neither corporation is publicly held.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Richard Hopewell ("Petitioner") brought a 42 U.S.C. § 1983 action in October 1993 in United States District Court for the District of South Dakota against the City of Sioux Falls, South Dakota, and various city employees (hereafter referred to as "City"), and Midcontinent Broadcasting Corporation, d/b/a KELOLAND News, Steve Hemmingsen and Jessica Armstrong (hereafter referred to as

"KELO News") as a result of news stories broadcast in October 1990 and an ensuing state court defamation action by Petitioner against KELO News. The lawsuit was Petitioner's second attempt to seek redress for imagined wrongs committed against him when he was an unsuccessful candidate for election to a South Dakota judgeship in 1990. The events giving rise to the lawsuit began a number of years earlier.

In the spring of 1978, Petitioner, an attorney, was arrested in a Sioux Falls drugstore, where he was found stark naked. Petitioner was placed under arrest for attempted rape by the Sioux Falls Police Department. His arrest and the events preceding and following it were the subject of police records and reports with local law enforcement and mental health agencies.

Petitioner became a candidate for state judicial office in 1990. After the campaign began, his arrest was the subject of coverage by local news media. KELO News broadcast news stories about Petitioner's 1978 encounter with the police and ensuing arrest. The stories were based in part on information contained in police records.

Petitioner brought a defamation action against KELO News in state court as a result of the stories. In that lawsuit, KELO News filed an affidavit from the police officer who arrested Petitioner in 1978. It also issued a subpoena for the Sioux Falls Police Department's records, which the City turned over for *in camera* review by the state court. The court released certain records to KELO News and sealed

others. In January 1994, summary judgment was entered in favor of KELO News in the defamation action.[1]

The federal lawsuit claims Petitioner's civil rights were violated because information contained in police records was used as part of the basis for the news stories, the City allowed the arresting officer to sign the affidavit in the defamation lawsuit and turned over police records for *in camera* inspection in that action. All Defendants filed motions to dismiss for failure to state a claim. Petitioner then filed amended and second amended complaints, to which all Defendants filed renewed motions to dismiss. At least one of the motions to dismiss requested in the alternative that the District Court grant summary judgment. Petitioner responded with a motion to file a second and third amended complaint.

On February 24, 1994, the District Court entered an order allowing the second amended complaint but denying leave to file a third amended complaint because a copy of that proposed complaint was not filed with the motion as required by local court rules. The Court elected to treat the motions to dismiss as motions for summary judgment and set a hearing date.

Various affidavits and other material were submitted and Petitioner filed a motion to continue the summary judgment hearing. The District Court denied the motion to continue and granted summary judgment. It ruled KELO News was not acting under color of state law and, hence, there was no state action as required by 42 U.S.C. § 1983.

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[1]An appeal is pending before the South Dakota Supreme Court.

The Eighth Circuit Court of Appeals affirmed in a *per curiam* opinion. A three-judge panel ruled none of Petitioner's constitutional were implicated and that the District Court did not abuse its discretion in denying Petitioner's motion to file a third amended complaint and the Rule 56(f) motion to continue the summary judgment proceedings. No petition for rehearing was filed.

ARGUMENT

Supreme Court Rule 15.2 requires counsel to draw to the Court's attention "any perceived misstatement of fact or law" that bears on the issues that would be before the Court. The Petition in this case is full of misstatements. Perhaps most flagrant is one which pervades the Petition and upon which it is predicated. The Petition begins with the assertion that on May 28, 1978, Petitioner was "detained" by police for a "reason other than an arrest for a criminal offense." Petition at 4. The fact is, however, that when Petitioner was placed in custody the arresting officer filled out an "ARREST REPORT" that specifically states Petitioner was "arrested" for "attempted rape." This also refutes Petitioner's claim that KELO News broadcast defamatory information. Defamation requires a false statement. *See* S.D. Codified Laws §§ 20-11-3, 20-11-4 (defining libel and slander as a "false" publication).

Petitioner states his proposed third amended complaint was filed with the District Court. Petition at 11. A review of the District Court record demonstrates this statement is false. He also asserts discovery information was "withheld" in the state defamation action. *Id.* This statement omits the fact the state trial court, applying rules virtually identical to the Federal Rules of Civil Procedure, ruled at least three

times that Petitioner had not made the showing necessary to obtain discovery.

I. The Issues Sought to Be Raised Do Not Merit Invoking the Court's Jurisdiction.

The factors that justify exercise of this Court's discretion to issue a writ of certiorari are not present here. For example, the first two "issues" deal with the denial of Petitioner's motions to amend his complaint and to continue the summary judgment proceedings. This Court has long recognized that whether to allow leave to amend is within the discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). Similarly, the courts of appeals agree that grant or denial of a Rule 56(f) motion is within the discretion of the district court. *See Licari v. Ferruzzi*, 22 F.3d 344, 350 (1st Cir. 1994); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994); *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3rd Cir. 1989); *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995); *American Lease Plans, Inc. v. Silver Sand Co.*, 637 F.2d 311, 317 (5th Cir. 1981); *Bush v. Rauch*, 38 F.3d 842, 849 (6th Cir. 1994); *United States v. On Leong Chinese Merchants Association Building*, 918 F.2d 1289, 1294 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991); *Humphreys v. Roche Biomedical Laboratories, Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993): *California Union Insurance Co. v. American Diversified Savings Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990), *cert. denied*, 498 U.S. 1052 (1991); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995).

Here, the Eighth Circuit determined the District Court did not abuse its discretion in denying those motions.

Petitioner has not demonstrated why this Court should review that exercise of discretion. This is particularly so with respect to the ruling on the motion to amend. The basis of the District Court's ruling was Petitioner's failure to comply with local rules of court. Petition at 39. No reason exists for this Court to review the District Court's application and enforcement of its local rules.

Moreover, the denial of these motions comports with prior decisions. As noted, the discovery sought by the Rule 56(f) motion was information that was the subject of court orders entered in the defamation action under discovery rules identical to the Federal Rules of Civil Procedure. Rule 56(f) discovery is less extensive in scope than that obtained under Rule 26. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 298 (1968). If Petitioner was not entitled to discovery under Rule 26, he cannot claim entitlement by virtue of Rule 56(f). His motion was simply an improper collateral attack on the state court orders.

Similarly, in Issue 7, Petitioner claims "fraud" was worked on the state court in the defamation action. This Court, however, is not being asked to review the state proceedings and would not have jurisdiction to do so until they are concluded. *See* 28 U.S.C. § 2101(d); Sup. Ct. R. 13.1. Petitioner has a remedy under South Dakota law. S.D. Codified Laws § 15-6-60(b) allows a judgment to be set aside on the grounds of "fraud" or "fraud upon the court." Petitioner can not, however, invoke this Court's jurisdiction when he has the opportunity to raise the claims in the court in which they occurred, something he has not done. *Cf. M.W. Zack Metal Co. v. International Navigation Corp.*, 675 F.2d 525, 529 (2d Cir.), *cert. denied*, 459 U.S. 1037 (1982). *See also* 7 MOORE'S FEDERAL PRACTICE, ¶ 60.37[3] (1992).

II. The Decisions Below Are Correct.

Petitioner asserts the decisions below conflict with decisions of this Court and two federal circuit courts of appeals. The fact is the courts below properly applied existing precedent.

A. *There Was No State Action by KELO News.*

It is crucial to ask just what conduct of KELO News is claimed to have violated Petitioner's civil rights. That conduct is obtaining information from police records[2] and using that information in a news story on a judicial election. It is absurd to assert that gathering and disseminating news can constitute state action.

This is demonstrated by the analogous case of *Brooks v. American Broadcasting Cos.*, 737 F. Supp. 431 (N.D. Ohio 1990), *aff'd in relevant part, rev'd in part*, 932 F.2d 495 (6th Cir. 1991). Plaintiff sought to amend his complaint for libel and invasion of privacy against ABC News to add a claim for conspiracy to violate his civil rights. 737 F. Supp. at 433-34. The district court determined the amendment could not withstand a motion to dismiss. *Id.* at 434, 438-40. After first noting that defamation and invasion of privacy do not constitute deprivation of constitutional rights, the court found there was no state action. It said:

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[2]At least one South Dakota court has held the press has an "unquestionable[]" constitutional right of access to the very type of records at issue here. *Sioux Falls Newspapers, Inc. v. City of Sioux Falls*, Civ. 85-305, (2d Cir., July 9, 1985).

> the only substantive point made by [plaintiff] is that defendants had access to official investigatory materials in preparing their broadcast. News reporters often have access to official reports and documents to aid them in investigating and preparing a story, yet that alone does not convert these acts into state action. To hold otherwise would be to render many actions by news agencies state actions and this would dilute the historic disassociation between the news media and government. The facts as alleged merely demonstrate defendants were acting as any news reporting organization typically does and this does not constitute state action.

Id. at 440. *See also Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (mere publication of an article based on information obtained from government officials not alone sufficient to constitute state action); *Mimms v. Philadelphia Newspapers, Inc.*, 352 F. Supp. 862, 865 (E.D. Pa. 1972) (no state action when reporter and photographer obtained access to prison from warden because "[t]hey are newspaper people whose orbit is far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it.").

Using government documents as a source of information does not convert KELO News into a state actor. There is no interdependent relationship with the City, *cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), nor is KELO News engaged in a traditional state function, *cf. Marsh v. Alabama*, 326 U.S. 501 (1946). The City does not require or encourage nor is it significantly involved in the newsgathering process. To take such a view would mean

state action exists any time a reporter reviews or uses a record maintained by a public official. To convert that into state action not only undercuts, it threatens the basic news-gathering process, a process government must be wary of intruding upon. *Cf. Janklow v. Newsweek*, 788 F.2d 1300, 1306 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir.), *cert. denied*, 115 S. Ct. 189 (1994) and cases cited therein.

B. *No Constitutional Right is at Issue.*

The main thrust of the Court of Appeals was none of Petitioner's constitutional rights were implicated. Petition at 33-35. This is correct, as is seen by reviewing the alleged violations in turn.

Petitioner first asserts disclosure of his arrest record violated his right to equal protection. Essentially, he claims general rules were applied to him in an arbitrary or discriminatory way. *Cf. Jones v. Helms*, 452 U.S. 412, 423-24 (1981). In such cases, a plaintiff must first show that, compared with others similarly situated, he was selectively treated. *See FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992). *See also Bender v. City of St. Ann*, 816 F. Supp. 1372, 1377 (E.D. Mo. 1993), *aff'd on other grounds*, 36 F.3d 57 (8th Cir. 1994). Petitioner claims only that certain information was provided to KELO News because he was a candidate for election to a judicial position. There is no assertion he was treated differently than others similarly situated. In fact, if other judicial candidates or their family members appeared in public in the nude or were arrested for attempted rape, there would likely be press coverage of those events, too. *Cf. In re Hughes County Action No. Juv. 90-3*, 452 N.W.2d 128, 131 (S.D. 1990) (detailing extensive press

coverage given juvenile case involving alleged incident at governor's residence). Thus, he fails the most basic element of any equal protection claim.

Second, what the Equal Protection Clause prohibits is selective enforcement based on an "unjustifiable standard such as race, religion or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). It is not enough for a plaintiff to show he was treated unfairly as an individual; rather, the particular course of action must have been taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects *upon an identifiable group.*" *Huebschen v. Department of Health and Social Services*, 716 F.2d 1167, 1171 (7th Cir. 1983) (*quoting Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis in original). *Accord, Trautvetter v. Quick*, 916 F.2d 1140, 1150-52 (7th Cir. 1990). *See also Cook v. Ashmore*, 579 F. Supp. 78, 85 (N.D. Ga. 1984) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). *Cf. Stern v. Sommerville Communications Corp.*, 529 F. Supp. 29, 30-31 (E.D. Mich. 1981) (holding no claim exists under 42 U.S.C. § 1985(3) against newspaper for alleged conspiracy with school system officials to violate a minor's civil rights absent class-based animus). Petitioner's "class" is evidently candidates for judicial office. Even constitutional law, though, treats candidates for public office differently than private individuals. *See New York Times v. Sullivan*, 376 U.S. 254 (1964) (imposing stricter burden of proof on public officials in libel actions). *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971). Any different treatment, though, is not based upon animus. Rather, it is based on the fact the individual is seeking a position of public trust, confidence and authority.

Petitioner also asserts that disclosure of this embarrassing information violated his substantive and procedural due process rights. The result here is dictated by a decision of this Court mentioned only in passing by Petitioner -- *Paul v. Davis*, 424 U.S. 693 (1976)

Even if some substantive due process right is implicated,[3] *Paul* holds that release of criminal records does not violate substantive due process. In rejecting a substantive due process claim in connection with the posting of plaintiff's name and photograph on a list of "active shoplifters," this Court noted that the plaintiff

> claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of any official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

424 U.S. at 713. *Accord*, *Wade v. Goodwin*, 843 F.2d 1150 (8th Cir.), *cert. denied*, 488 U.S. 884 (1988); *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329, 332 (5th Cir. 1973); *Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969); *Lahaza v. Azeff*, 790 F. Supp. 88, 93 (E.D. Pa. 1992).

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[3]"The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 114 S. Ct. 807, 812 (1994).

Paul likewise held that the interest in reputation is not a liberty or property interest protected by the Due Process Clause. It said:

> the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in [the Court's procedural due process] decisions. [State] law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions.

424 U.S. at 711-12. Similarly, South Dakota law does not grant Petitioner any legal guarantee of present enjoyment of his reputation. Rather, South Dakota provides him, like any other citizen, protection of his reputation via its tort law and an action for damages. *See* S.D. Codified Laws Chap. 20-11. Petitioner has already pursued this avenue of relief without success.

KELO News would finally note that Petitioner freely cries conspiracy. "Blind allegations" of conspiracy, though, are insufficient to withstand dispositive motions. *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987). Moreover, a § 1983 plaintiff must establish the deprivation of a protected right because it is the deprivation, not the conspiracy, that is the essence of the claim. *See Dixon v. City of Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990);

Farrar v. Cain, 756 F.2d 1148, 1151 (5th Cir. 1985). As detailed above, there is no deprivation here.

CONCLUSION

Respondents Midcontinent Broadcasting Corporation, d/b/a KELOLAND News, Steve Hemmingsen and Jessica Armstrong request the Court deny the Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and because the decisions below were proper.

Respectfully submitted,

Timothy M. Gebhart*
DAVENPORT, EVANS, HURWITZ & SMITH
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
(605)336-2880
Attorneys for Respondents Midcontinent Broadcasting Corporation, Steve Hemmingsen and Jessica Armstrong
* Counsel of Record